87-65

No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

I. Whether a trial judge has authority to restrain publication while considering an unprecedented conflict between First Amendment and Fourth Amendment rights.

II. Whether a prior restraint order involving an unprecedented question of priority of Fourth Amendment rights of privacy versus First Amendment rights of free press was "transparently invalid."

LIST OF PARTIES

After an order of the United States District Court for the District of Rhode Island was violated, William A. Curran, a private, disinterested attorney, was appointed as a special prosecutor in accordance with Rule 42(b) of the Rules of Criminal Procedure. A special prosecutor was required because the United States Attorney for the District of Rhode Island represented parties to the underlying action and the attorney for the party in the underlying action who was aggrieved by violations of the order declined to appear as prosecutor.

The proceedings below are criminal contempt proceedings instituted by the special prosecutor against respondents Providence Journal Company and Charles M. Hauser, its executive editor. The contempt proceedings below are entitled *In The Matter of Application to Adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, In Criminal Contempt.*

Petitioner in these proceedings is the United States of America.

The respondents before this Court are the Providence Journal Company and Charles M. Hauser.

TABLE OF CONTENTS

	Page
Questions Presented	I
List of Parties	II
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
I. The Decision of the First Circuit Permitting the Invalidity of the Prior Restraint Order To Be a Defense in Criminal Contempt Proceedings for Violation of Such Order Conflicts With Decisions of This Court	7
II. The Question Facing the Trial Court Regarding Priorities of Fourth Amendment Rights Versus First Amendment Rights Is Unprecedented and the Temporary Restraining Order Issued To Briefly Maintain the Status Quo While Considering It Is Not "Transparently Invalid."	9
III. The Decision of the First Circuit Permitting the Invalidity of the Prior Restraint Order To Be a Defense in Criminal Contempt Proceedings for Violation of Such Order Conflicts With Decisions of Other Circuits	11
Conclusion	12
Appendix	A-1

TABLE OF AUTHORITIES

Cases:

	Page
American Federation of Musicians v. *Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954)	11, 12
Howat v. *Kansas*, 258 U.S. 181 (1922)	7
Kingsley Books, Inc. v. *Brown*, 354 U.S. 436 (1957)	10
Near v. *Minnesota*, 283 U.S. 697 (1931)	10
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	10
Providence Journal Company v. *Federal Bureau of Investigation*, 460 F.Supp. 762 and 460 F.Supp. 778 (D. R.I. 1978), 595 F.2d 889 and 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980)	4, 9
Seattle Times Co. v. *Rhinehart*, __ U.S. __, 104 S.Ct. 2199 (1984)	10
United States v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972)	11
United States v. *United Mine Workers*, 330 U.S. 258 (1947)	7
Walker v. *City of Birmingham*, 388 U.S. 307 (1967)	7
Young v. *United States ex rel. Vuitton et Fils S.A.*, __ U.S. __, 107 S.Ct. 2124 (1987)	8

Constitutional Provision:

U.S. Constitution, Amendment I	3, 7, 10
Amendment IV	4, 9, 10

Statutes:

5 U.S.C. §552	4
18 U.S.C. §401	2
28 U.S.C. §1254(1)	2

Rules:

Fed. R. Crim. P. 42(b)	2, 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on December 31, 1986 and modified by an en banc order and opinion issued on May 12, 1987, in a proceeding entitled *In the Matter of Application to Adjudge The Providence Journal Company And Its Executive Editor, Charles M. Hauser, In Criminal Contempt.*

Opinions Below

The initial opinion of the Court of Appeals for the First Circuit is reported in the advance sheet at 809 F.2d 63 but was withdrawn from the bound volume pending the motion for rehearing and rehearing en banc. The initial opinion is reprinted in the appendix hereto, p. A-27, *infra*. The en banc addendum to that opinion is reported at __ F.2d __ and is reprinted in the appendix hereto, p. A-47, *infra*.

The opinion of the United States District Court for the District of Rhode Island (Boyle, C.J.) is reported at 630 F.Supp. 993. A later rescript order imposing sentences has not been reported. The District Court's opinion and order are reprinted in the appendix hereto, pp. A-1 and A-23, *infra*.

Jurisdiction

Criminal contempt proceedings were instituted against respondents in the United States District Court for the District of Rhode Island under Rule 42(b) of the Rules of Criminal Procedure. Jurisdiction was based upon 18 U.S.C. §401(3). Respondents were found to be in criminal contempt and sentences were imposed.

On respondents' appeal, the United States Court of Appeals for the First Circuit, through a three judge panel, entered, on December 31, 1986, a judgment and opinion reversing the District Court's order. On May 12, 1987 a petition for rehearing was denied, although the Court of Appeals did issue an en banc addendum and modification of the panel's initial opinion.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Rules of Criminal Procedure, Rule 42. CRIMINAL CONTEMPT

. . .

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

18 U.S.C. §401. POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

United States Constitution, Amendment I.

RELIGIOUS AND POLITICAL FREEDOM. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV.

UNREASONABLE SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

From 1962 to 1965 the Federal Bureau of Investigation (hereinafter FBI) tapped the telephones of Raymond L. S. Patriarca, a reputed organized crime figure. This surveillance was conducted without a warrant in violation of Patriarca's Fourth Amendment rights. The FBI's tape recordings of Patriarca's telephone conversations were destroyed but logs and memoranda were retained. The illegally intercepted conversations involved not only Raymond L. S. Patriarca but also his son, Raymond J. Patriarca.

In the late 1970's, during Raymond L. S. Patriarca's lifetime, respondent Providence Journal Company (hereinafter "Journal"), a Rhode Island newspaper, unsuccessfully sought to obtain from the FBI, under the Freedom of Information Act, 5 U.S.C. §552, the fruits of the illegal government searches and seizures. *See Providence Journal Company* v. *Federal Bureau of Investigation*, 460 F.Supp. 762 and 460 F.Supp. 778 (D. R.I. 1978), 595 F.2d 889 and 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). In 1985, after Raymond L. S. Patriarca's death, the Journal again asked the FBI to produce the Patriarca materials. The FBI assented to that request and furnished the materials to the Journal, as well as to several other news media.

On November 8, 1985 Raymond J. Patriarca filed a complaint against the FBI, its director, the United States Department of Justice, the Attorney General, the Journal and a

Rhode Island television station, WJAR-TV 10. The complaint sought, among other things, that the Journal be enjoined from publication of the illegally gathered information. Along with the complaint Patriarca filed a motion for a temporary restraining order and/or injunctive relief.

On November 13, 1985 at about 12:30 p.m. a chambers conference was held by Chief Judge Boyle to consider Patriarca's motion. Chief Judge Boyle indicated that he would schedule the matter for a hearing the next morning. Counsel for the media defendants objected to a hearing that soon, since they needed time to prepare and present legal authorities in objection to Patriarca's request. Therefore, rather than a hearing being scheduled for the morning of November 14, 1985, a hearing was scheduled for November 15, 1985. Believing at that time Patriarca was raising a novel issue concerning the priorities of Fourth Amendment rights of privacy and the First Amendment, and wishing to prevent irreparable harm to Patriarca, the trial judge preserved the status quo by entering a temporary restraining order enjoining publication by the Journal and WJAR-TV 10 regarding the illegally obtained materials pending the November 15, 1985 hearing. The restraining order was eventually vacated by Chief Judge Boyle on November 19, 1985.

A decision by the Journal to publish articles subject to the temporary restraining order had to be made by 10:30 p.m. on November 13, 1985 in order to meet the Journal's next cycle of publication. At no time was the court advised of this fact by the Journal; nor was the court informed that the newspaper intended to publish such articles.

No request was made by the Journal to vacate or stay the order. No petition for mandamus was made to the Court of Appeals. No appeal of the temporary restraining order was taken.

On November 14, 1985 the Journal and Charles M. Hauser, its executive editor, in violation of the court's November 13, 1985 order, published articles concerning the materials illegally gathered by the FBI.

The Journal and WJAR-TV 10 were represented by the same attorneys. Nevertheless, WJAR-TV 10 respected the order in that it did not broadcast the Patriarca materials while the order was in effect.

After notice and hearings, the Journal and Hauser were held in contempt and sanctions were levied. The Journal was fined $100,000; an eighteen month jail term was imposed on Hauser, which was suspended, and Hauser was ordered to perform 200 hours of public service.

The Journal and Hauser appealed. On appeal, a panel of the Court of Appeals for the First Circuit reversed the contempt judgment. The panel held that while court orders must normally be obeyed until vacated or modified (P. A-32, *infra*), the temporary restraining order was "transparently invalid" and could therefore be disregarded by the Journal and Hauser. (P. A-44, *infra*). No exact definition of "transparently invalid" was stated. The panel held that the Journal and Hauser were not required to seek judicial review before violating the order. *Id.*

The special prosecutor moved for rehearing with a suggestion that the matter be heard en banc. The court granted the suggestion for en banc consideration but denied rehearing. Rather, the en banc court, Judge Selya dissenting, issued an opinion as an addendum to, and modification of, the panel opinion while allowing the panel's opinion and order thus modified to stand. (P. A-47, *infra*).

The en banc addendum opinion, in what the court described as dictum (P. A-49, *infra*), suggested that publishers subject to prior restraint orders should make a good faith effort to seek emergency relief. (P. A-48, *infra*). Again, respondents had made no effort in any court for relief. In this case, however, the court had no "clear conviction" that emergency relief was available to respondents within the restraints governing the publisher's decision making. (P. A-49, *infra*). Also, the court believed it would be unfair, because of the publisher's failure to follow the procedures announced in the addendum opinion, to subject respondents to the sanctions imposed. *Id.*

The Reasons for Granting the Writ

I. The Decision of the First Circuit Permitting the Invalidity of the Prior Restraint Order To Be a Defense in Criminal Contempt Proceedings for Violation of Such Order Conflicts With Decisions of This Court.

Where courts have jurisdiction, their orders, however erroneous, are to be obeyed until such orders are vacated or modified. *Walker* v. *City of Birmingham*, 388 U.S. 307, 319-21 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 290-93 (1947); and *Howat* v. *Kansas*, 258 U.S. 181, 189-90 (1922). People may not bypass orderly judicial review of injunctive orders before disobeying them. *Walker* v. *City of Birmingham*, 388 U.S. at 320. These rules apply even when the injunction prohibits exercise of First Amendment rights. *Id.* This case is important since the First Circuit's ruling conflicts with these fundamental principles.

The First Circuit found an exception to the bedrock rule that court orders, even those later ruled unconstitutional, must be obeyed until amended or vacated. In cases involving federal law, the First Circuit is the only court to so rule.

The First Circuit, citing *Walker*, held that "transparently invalid" orders may be ignored. (P. A-33, *infra*). The First Circuit misread *Walker*. That case recited the rule plainly:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, *must be obeyed* by them *however erroneous the action of the court may be*, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. *It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed* for error by orderly review, either by itself or by a higher

> court, *its orders* based on its decision *are to be respected*, and disobedience of them is contempt of its lawful authority, to be punished." 258 U.S., at 189-90.

388 U.S. at 314 (emphasis added).

There is no exception to this rule based on degrees of invalidity. The First Circuit has held that in certain circumstances individuals rather than courts are permitted to determine what the law is and how they shall govern themselves. That ruling contradicts this Court's recent statement that,

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

Young v. *United States ex rel. Vuitton et Fils S.A.*, __ U.S. __, 107 S.Ct. 2124, 2131 (1987).

This case raises a significant question regarding authority of federal courts. Trial judges often, as in this case, must interrupt other court business in order to pass on petitions for emergency relief. There is little time available in such circumstances for cool reflection on intriguing questions of law. Orderly government and administration of justice requires respect for court orders—even those which on second thought are later changed. The Court concluded its opinion in *Walker* by pronouncing that, "[N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion." 388 U.S. at 320-21. This petition raises the important question of whether that pronouncement is still good law.

II. The Question Facing the Trial Court Regarding Priorities of Fourth Amendment Rights versus First Amendment Rights Is Unprecedented and the Temporary Restraining Order Issued to Briefly Maintain the Status Quo While Considering It Is Not "Transparently Invalid."

The trial judge was faced at the temporary restraining order conference with several facts. (1) The information regarding Patriarca had been seized by the FBI in violation of his Fourth Amendment rights. (Pp. A-2, A-28, *infra*). (2) If the Journal was allowed to publish, the damage to Patriarca could not be undone. (Pp. A-6, A-8, *infra*). (3) The Court of Appeals for the First Circuit had previously made rulings regarding the very FBI materials in question, including (a) balancing the Journal's right of access and publication of the materials against Patriarca's right of privacy and finding in favor of Patriarca, *Providence Journal Co.* v. *Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979), and (b) holding that the Journal was not entitled to the FBI materials. *Providence Journal Co.* v. *Federal Bureau of Investigation*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). (4) There was no judicial precedent. (Pp. A-15, A-40, *infra*).

The answer to the Fourth Amendment versus First Amendment question was not an easy one to resolve in the short time available. Chief Judge Boyle, just several weeks before the temporary restraining order chambers conference, had attended the First Circuit Judicial Conference in Puerto Rico where one of the lectures dealt with the precise issue of constitutional privacy rights conflicting with the media's First Amendment rights. To illustrate the novelty of the question raised, one need only note that the Journal rejected the court's offer for next day service and requested a continuance in order to gather and present authorities. Logically, where the question presented was difficult, the answer, regardless of what it is, cannot be considered "transparently invalid."

The question raised was not frivolous. Not only did the issue deserve attention at the First Circuit Judicial Conference, but apparently at least one justice of this Court believes it merits consideration. Indeed, while Justice Stevens agreed in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), that no Sixth Amendment right to a fair trial case could warrant prior restraint of a newspaper, he specifically left open the question of whether the same absolute First Amendment protection would apply to all intrusions on privacy. 427 U.S. at 617 (Stevens, J., concurring).

Likewise, the Court in *Near* v. *Minnesota*, 283 U.S. 697 (1931), while broadly condemning prior restraints, carefully left open "questions as to the extent of authority to prevent publications in order to protect private rights. . ." 283 U.S. at 716. *Cf. Seattle Times Co.* v. *Rhinehart*, __ U.S. __, 104 S.Ct. 2199, 2207, 2208 (1984) (in order to protect privacy, newspapers may be enjoined from publishing materials obtained through pretrial discovery).

As Mr. Justice Frankfurter explains, "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957). Rather, what he favored was a "pragmatic assessment of its operation in particular circumstances." 354 U.S. at 442. Chief Judge Boyle was simply holding matters in the status quo while he invited counsel to help him in an unprecedented legal setting to make a reasoned, "pragmatic assessment" of the facts and law in these "particular circumstances."

Given the First Circuit's previous opinions regarding the Journal access to the materials in question here, the absence of any precedent resolving the Fourth Amendment versus the First Amendment question and the recorded coments of Chief Justice Hughes in *Near*, added to those of Justices Stevens and Frankfurter, the restraining order certainly cannot be considered frivolous or "transparently invalid."

III. The Decision of the First Circuit Permitting the Invalidity of the Prior Restraint Order To Be a Defense in Criminal Contempt Proceedings for Violation of Such Order Conflicts With Decisions of Other Circuits.

The First Circuit's opinion not only conflicts with *Walker*, *United Mine Workers* and *Howat*, but it is also in conflict with *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), and *American Federation of Musicians* v. *Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954).

In *Dickinson* the district court ordered news reporters not to publish testimony given in a criminal trial; that order was violated by publication and the reporters were held in criminal contempt. On appeal, the Court of Appeals for the Fifth Circuit held that the gag order was "constitutionally unacceptable, and hence illegal." 465 F.2d at 509. Nevertheless, the Fifth Circuit held that a person must obey orders of a court with jurisdiction and that invalidity of the order, even where the invalidity is of constitutional proportions, may not be a defense to contempt charges. *Id.* The Fifth Circuit remanded the case to the district court to determine whether the contempt judgment or the punishment was appropriate in light of the unconstitutionality of the order.

The First Circuit recognized that its opinion is in conflict with *Dickinson*, but predicted that if the Fifth Circuit were now faced with the case, i.e., after *Nebraska Press Association*, a different result might be obtained. (P. A-43, *infra*). Notwithstanding the First Circuit's comments, there are at least three significant aspects of *Dickinson* which make it indistinguishable from the First Circuit's opinion, regardless of the intervention of *Nebraska Press Association*. First, *Dickinson*, essentially predicting *Nebraska Press Association*, held that pure speech rights were violated. 465 F.2d at 509. Second, the *Dickinson* court grounded its ruling squarely on

Walker, an opinion it believed was quite plain. *Id.* Finally, the *Dickinson* court rejected the contemnors' argument, the same argument made by the Journal and Hauser, that the traditional rule that orders must be obeyed until vacated or reversed does not apply to injunctions infringing freedom of the press. 465 F.2d at 511. The First Circuit and the Fifth Circuit are in clear conflict.

In *American Federation of Musicians* v. *Stein*, *supra*, a union was restrained from publication of plaintiff's name in the union's magazine on an "unfair" agents list. A criminal contempt judgment for violation of the order was upheld. The First Circuit is therefore also in conflict with the Sixth Circuit.

Conclusion

For these reasons, it is respectfully submitted that this petition for a writ of certiorari be granted so that the judgment and decision of the United States Court of Appeals for the First Circuit may be reviewed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CIVIL ACTION No. 85-0707B
MISC. No. 86-003B

RAYMOND J. PATRIARCA,
PLAINTIFF,

v.

FEDERAL BUREAU OF INVESTIGATION,
AND
WILLIAM H. WEBSTER, DIRECTOR,
AND
UNITED STATES DEPARTMENT OF JUSTICE,
AND
EDWIN MEESE, ATTORNEY GENERAL,
AND
THE PROVIDENCE JOURNAL COMPANY.

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT

OPINION

BOYLE, FRANCIS J., Chief Judge.

The Defendant Providence Journal Company (hereinafter "the Journal") was directed to show cause why it was not in contempt of a temporary restraining order entered by the Court on November 13, 1985. The order directed that the Journal not publish information collected more than twenty years ago in violation of the Fourth Amendment rights of Plaintiff Raymond J. Patriarca. At issue are three fundamental constitutional principles: (1) freedom of the press; (2) the right

of the people to be secure in their persons, homes, papers and effects under the Fourth Amendment; and (3) the judicial power of the United States. In this instance the controversy is resolved in favor of the people and the United States.

The Journal publishes two daily newspapers and a Sunday paper. Its views enjoy statewide distribution within Rhode Island. It is the only newspaper which does. Its own description of the event which gives rise to this action appeared in a "banner" front page headline of one of its November 14, 1985 publications. The headline stated, "Court, Journal clash over use of tapes." The sub heading proclaimed, "Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings." The first paragraph reads:

> A federal judge yesterday ordered the *Journal Bulletin* not to publish information about reputed mob leader Raymond J. "Junior" Patriarca obtained through illegal FBI surveillance. Citing the Constitution's guarantee of a free press, the newspaper today published an article despite the order."

The sole issue at this time is whether a publication can be ordered deferred to permit a court an opportunity to determine the right to publish. The Journal argues that the judicial power of the United States does not permit a court to determine this right, and that the Fourth Amendment protection of the people's rights to be secure in their persons, homes, papers and effects is overridden by the freedom of the press secured by the First Amendment. The Journal seeks to justify its violation of law by labeling the order a "prior restraint" and "censorship."

Two essential facts are admitted: (1) the information published was obtained by the Government in violation of the Plaintiff's Fourth Amendment rights: (2) the Defendant Journal willfully and deliberately violated the temporary restraining order entered November 13, 1985.

The Court determines (1) that the Journal does not enjoy its claimed unique, superior constitutional status, free of all judicial inquiry; (2) that the people of the United States are entitled a judicial determination of the extent of their Fourth Amendment security; (3) that it has been previously determined that the Journal had no right to the information, a determination of which the Journal had actual knowledge, and (4) that determinations of constitutional rights are vested by the Constitution in the Courts of the United States.

I. The Facts

The initial complaint was filed by Raymond J. Patriarca on Friday, November 8, 1985. On the following Wednesday (November 13), the Court met in Chambers with counsel for all parties to consider only the application of Raymond J. Patriarca for a restraining order. The Court was advised that the Plaintiff was not then seeking any relief on behalf of Raymond L. S. Patriarca, deceased. The Court granted the request for a temporary restraining order and offered to hear counsel in open Court the following morning on whether the restraining order ought to be continued. Counsel for the Defendant Journal advised that it was not prepared to proceed on such short notice, and at the request of the Journal's counsel, a hearing was set for Friday (November 15). The next morning, Thursday the 14th, the article appeared in the Journal. Following the Friday hearing, the Court scheduled a hearing on Plaintiff's motion for a preliminary injunction for the following Tuesday (November 19). On November 19, 1985 the motion for preliminary injunction was denied as to the Journal but granted as to the Federal Bureau of Investigation (hereinafter "the FBI") and the Justice Department.

The restraining order which entered on November 13 restrained the Defendant, Journal from

> distributing, disseminating or otherwise publishing the logs or airtels, or reports thereof, generated as a result of

electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as they relate to Raymond J. Patriarca, pending hearing at 10:00 P.M. on Friday, November 15, 1985.

Within hours of the entry of the order, no later than 10:30 P.M. that very day, the Journal determined that it would violate the restraining order. Various reasons were advanced including the reason that the order constituted "censorship" and was a "prior restraint" and that to defer publication even for a day was to invite politicians and gangsters to use the same tactics to prevent publication of unfavorable information.

On its front page, the Journal in all its publications on Thursday, November 14, published a story which reported alleged conversations between Raymond J. Patriarca and his father, Raymond L. S. Patriarca which had been electronically intercepted by the Federal Bureau of Investigation. The report was based on copies of summaries of conversations which had taken place between 1962 and 1965, some twenty years previous. The story written by Robert Kramer reported that the elder Patriarca, according to the FBI's version of the conversation, advised his son, Raymond J. Patriarca, "You only lie to cops and people you don't know," and "he should marry an Italian girl as she will stand by you when you are in trouble, or won't call the police if you rap her in the mouth." The alleged conversations also concerned the son's difficulties in school and with his friends, both male and female. The tapes that contained the actual statements had been long since destroyed and that all that was available to the Journal were the summaries prepared by FBI Agents. The news story was entitled, "The Patriarca Tapes"; in fact, there are no such tapes.

At the foot of the story, was the "Journal's Statement," which professed respect for the judge who had entered the restraining order. The statement read, in part: ". . . in this case

we are convinced that his order would impose a prior restraint in violation of the Constitution. For that reason we have decided to publish in today's Journal Bulletin the first of a series of stories based on the Patriarca tapes."

A motion to cite the Journal in contempt was filed by Raymond J. Patriarca on November 14, 1985, and when he declined to prosecute the motion, and because the Government was already a party, the Court appointed William A. Curran, Esquire, as a special prosecutor as authorized by Rule 42(b) of the Federal Rules of Criminal Procedure. The Journal elected to proceed without a jury and the parties have stipulated to the facts. The parties were heard on an order directing the Journal to show cause why it should not be held in contempt.

II. Providence Journal Co. *v.* F.B.I.

This controversy has a history. Between the years 1962 and 1965, the FBI maintained a "bug" which recorded conversations within the premises located at 168 Atwells Avenue, in the City of Providence. The property was occupied by Raymond L. S. Patriarca, who police officials claimed was the head of Organized Crime in south-east New England. The "bug" was placed without benefit of a warrant of any kind. It was placed in violation of the Fourth Amendment prohibition of unlawful searches and seizures. The information that was obtained through the use of the bug was obtained by the Government in violation of the Fourth Amendment to the United States Constitution.

The Journal sought disclosure of the tapes from the Department of Justice. The initial request, made November 1, 1976, was refused on the basis that the disclosure of investigatory files compiled for law enforcement purposes would be "an unwarranted invasion of privacy" under the provisions of 5 U.S.C. §552(b)(7)(C). The Journal brought suit in this district to compel disclosure of logs and memoranda made by agents from the tapes which by that time had been erased. *Provi-*

dence Journal Co. v. *F.B.I*, 460 F.Supp. 762 (D.R.I. 1978), *rev'd*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). Raymond L. S. Patriarca was permitted to intervene in the action because Mr. Patriarca's interests "may not [have] be[en] adequately represented" by the Government which had bugged his premises in the first instance. The court (Pettine, Ch. J.) noted that Mr. Patriarca has "a colorable claim arising directly under the Fourth Amendment for injunctive relief to protect his right to be free of unreasonable searches and seizures and governmental improprieties with regard to those seizures." 460 F.Supp. at 767.

Two passages from Chief Judge Pettine's opinion, of which the Journal must be charged with actual knowledge, bear statement at this point:

> Because the fourth amendment protects persons against intrusion on private places and conversations, even those carried on in the most public of phone booths, it surely follows that the Fourth Amendment has something to say about the reasonableness of the uses to which the state puts the seized information. Forbidding the state to wiretap a conversation, but providing no remedy when it not only wiretaps but discloses the contents of the conversation to the public would be to recognize a constitutional right without a concomitant remedy. For if an initial intrusion invades privacy, the public disclosure of what is seized destroys it altogether. Moreover, without this penumbral protection for the seized information, the core fourth amendment right to be free of the initial intrusion would be less secure.

460 F.Supp. at 771. Given such language, surely the Journal was aware that some judicial thinking would require there be a remedy for violations of the Fourth Amendment rights of all. The Court further stated:

> However, I must advert to a spectre of abuse of the government's duty to disclose, which this decision calls to mind. Instead of protecting the right to know and facilitating a newspaper's access to governmental information, the improper disclosure of information can be used to threaten political expression and coerce conformity. We need only remember the FBI's surveillance of Martin Luther King and the use of information or misinformation against him, and recall the burglary of Daniel Ellsberg's psychiatrist, which was carried out for the express purpose of obtaining information to leak to the press, and note that the White House authorized the break-in and bugging of the Democratic National Committee and has used its access to various governmental agencies to gain information about those not in favor, to accept immediately the proposition that the executive's disclosure or threatened disclosure of information, improperly obtained or retained, can impair core first amendment rights.

460 F.Supp. at 777. The First Amendment rights referred to are not the rights of a free press but the rights of a free people. Again, the Journal must be charged with knowledge and notice of this caveat because it was emphasized in connection with the effort of the Journal to obtain the same information which is the basis of this action. In this earlier action the district court refused to make available matters relating to Mr. Patriarca's family relationship and details of private lives of his family members who are still living.

Pending appeal, the Government and Mr. Patriarca sought a stay of that part of the district court's order which required disclosure. In its consideration of the application for the stay, the Court of Appeals for the First Circuit pointed out that the District court declined to stay proceedings for more than a brief time because a longer stay would be a "prior restraint" upon the Journal's publication rights. *Providence Journal Co.* v. *F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979). The Court of Appeals granted the stay on February 20, 1979, and stated at page 890:

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Appellants are not, of course, entitled to a stay pending appeal without showing that their appeals have potential merit. We believe that they have made a sufficient showing on this score. Where, as here, the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay. *See Washington Metropolitan Area Transit Commission* v. *Holiday Tours*, 182 U.S. App. D.C. 220, 559 F.2d 841 (1977). Our reading of the district court's opinions and of the briefs indicates that there are serious legal questions presented. The district court itself stated,

> "[T[his is a case of initial impression wherein respectable minds might differ and [embodied] a strong public policy. . . ."

Failure to grant a stay will entirely destroy appellants' rights to secure meaningful review. On the other hand, the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure —assuming the Journal prevails—by whatever period of time may be required for us to hear and decide the appeals. Weighing this latter hardship against the total and immediate divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.

The stay was in effect for more than five months, from February 20, 1979 to July 27, 1979, the time required to hear and determine the controversy. At no time from the beginning of the litigation was the Journal permitted disclosure of Patriarca family information.

The restraining order issued by this Court was not the first time that the Journal had been prevented from publishing

information concerning the Patriarca family illegally obtained. In *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980), the Court of Appeals held that the disclosure of the information would violate Title III of the Omnibus Crime Control and Safe Street Acts of 1968, 18 U.S.C. §2510, *et seq.*, as a disclosure of unlawfully obtained information. The Court of Appeals was not concerned that the information was collected before the effective date of the Act (Title III) since disclosure which is also forbidden would take place after the effective date of the Act. The court in part stated, "...the invasion of privacy is not over when the interception occurs, but is compounded by disclosure.... Congress has, in the clearest way, thus decided that the privacy interest of a victim of illegal electronic surveillance is too great to permit any disclosure at all." 602 F.2d at 1013.

In order to emphasize the point the court stated further: "Congress had decided that the risk to privacy created by electronic surveillance is too great to permit any disclosure of the fruits of such surveillance.... In fact, this was exactly the kind of 'insidious invasion of privacy' that Congress 'singled out for special scrutiny and safeguards.' (cite omitted) Intrusions before 1968 were no less insidious than intrusions after 1968, and to the extent reasonable, the victims should be protected from disclosure after 1968 in accord with Congress' stated policy." 602 F.2d at 1013-1014.

This determination certainly should have ended the matter, for the clear holding of the Court of Appeals was that the information obtained by means of illegal electronic surveillance from 1962 to 1965 may not be disclosed by the Journal after 1968. It was determined that the disclosure by either the Providence Journal or the Government was forbidden by an Act of Congress. It is also clear that the determination does not rest on a right of privacy based on constitutional or common law, but on a determination of Congress' dealing with the burdens and benefits of electronic surveillance.

Such was not to be however. With the death of Raymond L. S. Patriarca, the Journal revived its efforts which appeared already to have been foreclosed for all time by its loss in the Court of Appeals. This time, the Government had changed its position, and in spite of the fact that the Court of Appeals had already held that Congress had forbidden disclosure of the very information sought, it delivered the information, not only to the Journal, but to a number of other news agencies as well.[1] The Journal received the information in the summer of 1985 and published it on November 14, 1985.

The initial complaint filed in this action was based on the Freedom of Information Act, 5 U.S.C. §552. However, in the motion for temporary restraining order and the memorandum in support, the Plaintiff asserts Fourth Amendment arguments. In the memorandum, Plaintiff specifically cited *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010, and argued that disclosure of the information was barred by that opinion as a violation of Title III.

III. The Journal's Contentions

At the time of the application to this Court, this Court, like the Court of Appeals in the earlier proceeding, was concerned that unless the status quo was maintained for a time until the Court could sort out the various contentions, there would be no status to preserve, and publication would make the matter moot. The immediate issue raised by the application for a restraining order was whether publication should be delayed to afford to a court the opportunity to consider and react. The Journal was not then prepared to go to an immediate hearing on the continuance of the restraining order and itself asked for and obtained an additional day to prepare for a hearing. Thus, with significant legal issues raised and the fact that those issues would be essentially moot unless the Court acted to forestall immediate publication, a temporary restraining order was entered.

[1] Willful disclosure is a felony, 18 U.S.C. §2511(1)(c)(d). 18 U.S.C. 2520 provides a civil action for damages. Injunctions are not precluded. *See Spock* v. *United States*, 464 F.Supp. 510 (S.D.N.Y. 1978). Since the Government was also a party to that action, it was on notice of the Court of Appeals' opinion that disclosure after 1968 of information illegally obtained before 1968, is a violation of Title III.

It is that order that was immediately and deliberately ignored and willfully disobeyed. The Journal does not contest a willful and deliberate violation of the order. Indeed, it could not because it made clear that it wished an immediate confrontation wrapped in the protective banner of the First Amendment freedom of the press. Rather, the Journal looks to ex post facto relief as an escape from its obvious contempt. It argues (1) that violation of a restraining order affecting "pure" speech cannot be the basis for criminal contempt if the order is later invalidated; and (2) that the Court "clearly lacked subject matter jurisdiction" and therefore, there can be no contempt.

1. *Subject Matter Jurisdiction*

The argument that the Court lacks jurisdiction of the subject matter proceeds on the theory that the claim to jurisdiction of the Plaintiff here is frivolous. The Journal asserts that the only basis for jurisdiction here asserted are the Freedom of Information Act (FOIA), 5 U.S.C. §552, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq*. The Journal also asserts that there was an ineffective Fourth Amendment claim put forth by the Plaintiff. What the Journal argues is not that the Court lacks subject matter jurisdiction, that is the lawful ability of a court to resolve a controversy, but that the Plaintiff does not state a claim upon which relief may be granted. Thus, the Journal argues that there is no basis for injunctive relief under the Freedom of Information Act, citing *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), and that Title III of the 1968 Crime Control Act does not provide for "injunctive relief barring dis-

closure of information wrongfully intercepted prior to the statute's enactment.[2] *Mirabile dictu*, the Journal cites the District Court opinion which was reversed on this precise issue by the Court of Appeals, "*Providence Journal Company* v. *Federal Bureau of Investigation*, 460 F.Supp. 762, 679 (sic)." The Journal also relies on *Zerilli* v. *Evening News Ass'n.*, 628 F.2d 217 (D.C. Cir. 1980). In *Zerilli*, the District of Columbia Circuit did hold that Title III remedies apply only to interceptions which took place after 1968. This is clearly not the law in this Circuit. The D.C. Court also held that there was no independent Fourth Amendment claim against a publisher of illegally obtained information, declining to extend a *Bivens* type remedy.[3] *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Of course, *Bivens* could only apply to government officials. It came to this conclusion on the basis that the Fourth Amendment is concerned only with searches and seizures and that the First Amendment freedom of the press "militates against such a result." However, it is well established that individual criminal defendants may enforce the exclusionary rule and nothing makes the First Amendment superior to the Fourth Amendment.

Of course, the issue is not what is known now regarding the Court's jurisdiction, but what was known at the time that the restraining order entered. Certainly no court is charged with instantaneous knowledge of all applicable precedent. Indeed, there is nothing to suggest that the Journal called to the Court's attention before the publication any authority relevant

[2] In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), the court suggested that balancing of interests might be desirable in circumstances such as this where the Freedom of Information Act and the Privacy Act are both involved. 441 U.S. at 293 & n.14. Note 14 points out that 5 U.S.C. §552(a) unlike the FOIA bars disclosure. *See* 5 U.S.C. §552(a). Although a minority view, injunctive process to prevent disclosure has been sustained. *Wolman* v. *U.S. Selective Service System*, 501 F.Supp. 310, 311 (D.D.C. 1980).

[3] Each of these conclusions may well be without vitality. *See Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912, *reh. denied*, 453 U.S. 928 (1981).

to the jurisdiction issue. It is to be remembered that the purpose of the temporary restraining order was to hold matters in *status quo* pending a brief interlude for research and contemplation. Courts simply cannot function as "drive in" businesses if the quality of the judicial product is to be worthwhile.

This court has subject matter jurisdiction over this controversy. The Plaintiff seeks enforcement of a constitutional right and enforcement of federal statutory rights. The possibility that Plaintiff may not succeed has nothing to do with the right of this Court to determine whether or not he may succeed.

2. *The Validity of the Order and Criminal Contempt*

The second argument which the Journal makes is that it cannot be held in contempt for exercising "pure" speech if the restraining order is later invalidated. This argument is split into two subsidiary arguments: 1) that the circumstances do not satisfy the requirements for a valid prior restraint; and 2) that the First Amendment freedom of the press precludes a finding of criminal contempt.

In addressing the first of these arguments, it is necessary again to briefly review what occurred. The restraining order entered after a conference with all parties in Chambers. The Court offered to hear the matter in open Court on the next day, but the Journal's counsel asked for and received an additional day for preparation. In the meantime, however, and within certainly less than twelve hours, the Journal made a deliberate decision to violate the order. Whatever the explanations of its counsel, the testimony of its Executive Editor and the circumstances admit of but one conclusion, that the Journal violated the order because of a firmly held conviction that under no circumstances did any court have any authority to tell it not to publish. Its view of the First Amendment is clearly that it has an irrevocable license to publish whatever it pleases whenever it wishes to do so. Although its statement professed

respect for the Judge, its words and actions were those of utter defiance of the constitutional system of justice. It is a system of justice that requires respect. The Journal set itself above the law. In its self-proclaimed "clash" with the Court, it was immediately determined to proclaim itself the victor. Now it argues that the Order was invalid in any event, and hence, it says, a nullity.

The Journal has been seeking to publish the information for many years. It had been denied the information because disclosure would violate Title III. *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010. The United States Supreme Court had declined to intervene, denying certiorari at 444 U.S. 1071 (1980). This decision is not only precedent which this Court is required to follow, it is *res judicata* as to the parties to this action. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). In fact, based on the opinion in *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010, disclosure of the information is a felony. 18 U.S.C. §2511.

The parties have stipulated that the Journal received the information lawfully. The parties may not stipulate the law, and since this stipulation purports to do so, it is rejected. *Young* v. *United States*, 315 U.S. 257, 259 (1942); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 152 (1942); Annot., 92 A.L.R. 663, 664 (1934). It is for the court to determine the law, and, in this instance, the lawfulness of the disclosure is more than seriously in question. As has been pointed out previously, the circumstances suggest a willful disclosure of illegally obtained information, an action forbidden by 18 U.S.C. §2511.

Standing alone, the foregoing circumstances argue strongly for the opportunity for further reflection. The circumstances, however, do not stand alone. Throughout this controversy the Court has not been given, nor has it received, a satisfactory explanation of the basis on which this information was disclosed. This court was concerned with the spectre of a rule

which permits the Government to intrude into everyone's most private thoughts and conversations, obtain them illegally and then publish them to a news organization for dissemination for profit to the public. This was not a novel concern. It was expressed by Chief Judge Pettine to this very Defendant in *Providence Journal Co.* v. *F.B.I.*, 460 F.Supp. 762. He, in part, observed: "the improper disclosure of information can be used to threaten political expression and coerce conformity." 460 F.Supp. at 777.

The Fourth Amendment is the only amendment to the Constitution that expressly refers to the "right of the people." It was adopted because of the experience of the colonists with writs of assistance which allowed government agents to continually rummage through their homes seeking evidence of smuggling. Any information obtained by the Government in violation of the Fourth Amendment may not be used in Court. Under the Defendants version of the issue, such information could be used by anyone, except in court. The rule necessarily provokes a visceral judicial reaction that this indeed may not be the rule that applies in a civilized society. The issue is one which has not been considered by the United States Supreme Court, nor has it even been squarely faced by any other Court, except in one instance to be discussed hereafter. The Journal would have the Fourth Amendment confined to the so-called exclusionary rule. Neither by its terms nor by its history is the purport of the amendment so limited. Historically, it was intended to provide security to people from Government intrusion into civil privacy, not solely for the purpose of protecting those people accused of crimes.

Throughout, the Journal has treated the privacy protected by the amendment as if it involved the tort of invasion of privacy. However, the tort action for invasion of privacy had very different progenitors, namely Samuel Warren & Louis Brandeis, who wrote The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The authors base the action upon "the right to be

let alone." The historical antecedents are found in English common law and such cases as *Pope* v. *Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (1741) and *Prince Albert* v. *Strange*, 2 De G. & Sm. 652, 64 Eng. Rep. 293 (1849). There is no historical relationship between the privacy protected by the Fourth Amendment and the tort action for private invasions of privacy. It is clear beyond doubt that the Fourth Amendment was intended to bar government intrusion. The question surely must be — is the amendment so sterile that it provides no real protection? The Supreme Court has rejected a damages action alternative with respect to the exclusionary rule. Would it do less if the issue involved privacy of one not charged with a crime who was to be tried in the court of public opinion?

Since they were adopted simultaneously, it would make sense that all amendments to the Bill of Rights be construed as a coordinate whole and as part of a coordinate scheme. Reading the First Amendment provision of a free press to cancel out Fourth Amendment security can only be based on the numbering of the amendments. Judicial decisions are not made on such shallow reasoning. Certainly, it does not do violence to the constitutional scheme if a free press were required to respect Fourth Amendment personal security. If reasons are required, they are those stated by Judge Pettine in *Providence Journal Co.* v. *F.B.I.*, 460 F.Supp. at 771, 777, that a constitutional right without a remedy is a hollow pronouncement, and, that a contrary view would permit the Government to destroy those whom it perceives as its enemies by disclosing unlawfully obtained information to the free press. Total freedom would thus be granted to the Government and the press and denied the people. It is quite possible that a reasoned judicial consideration might well find such a result totally unacceptable.

There is much information that is denied to a free press. To begin with, it has no right to force any person to provide it with information. "No comment" is not an uncommon re-

response to its inquiries. Judicial denial of information to the press is not a totally rare occurrence. *See Pell* v. *Procunier*, 417 U.S. 817, 834 & n.9 (1974). It is denied national security information which presents a clear and present danger. *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). Grand Jury proceedings are secret. Fed.R.Crim.P. 6. A newspaper may not use the copyrighted material of others. *Harper & Row* v. *Nation Enterprises*, __ U.S. __, 85 L.Ed.2d 588, 604 (1985). The free press may be prevented from publishing obscene material. *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Title III of the Safe Streets Act of 1968 denies it access to information obtained by illegal electronic surveillance, whether that information was obtained before or after 1968. *Providence Journal Co.* v. *F.B.I.*, 602 F.2d at 1013-14.

The Journal's contention that "pure" speech is *per se* entitled to immediate publication finds no support anywhere. Indeed it has been stated that "prior restraints are not unconstitutional *per se*." *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1974) (relating to the theatrical production "Hair").

The real "clash" in this action, the clash between the First and Fourth Amendments, deserves more than a passing glance. It is a real, substantial and indeed vital issue, which does not deserve the cavalier attitude displayed by the Journal. The above analysis demonstrates the absolute need for at least a brief time to consider the merits of this action. The issue is not frivolous.

Should the foregoing be found inadequate to justify a brief respite, there is a further practical consideration. The Court was not informed of the nature of the information itself at the time the restraint issued. This is not to say that the content of the information is itself significant. The Court became aware of the nature of the information only by reading the next day's newspaper. The significance of this observation is that at least a court should be apprised of the information with which it is

dealing. In this instance the Journal managed by its own efforts to avoid this scrutiny, although labelling the order "censorship."

The fact that the Court ultimately vacated the restraining order and denied a preliminary injunction does not establish that the restraining order is invalid. There are significant differences between a preliminary injunction and a restraining order; that is, a restraining order is intended to hold matters in *status quo* and to prevent ongoing events from mooting a controversy, whereas a preliminary injunction is usually heard after issue has been joined and represents a preliminary judgment on the merits of the cause. In fact, given the time for further unhurried reflection and additional time to research the issues involved, the Court is by no means certain that it should have denied a preliminary injunction. Plaintiff has a powerful Fourth Amendment argument and it is only now that the true effect of the prior litigation involving this information is clearly apparent. It might well be that should the occasion arise in the future a very different result would be reached.

The restraining order which issued has not been held invalid. On reflection, it appears to have been appropriate and tailored to the circumstances. The Court was prepared to grant a forthwith consideration of the issues on the record within less than twenty-four hours of the issuance of the Order. This did not happen because the Court granted the request of the Journal to defer for an additional day, the very time required for the Journal to violate the Order.

Whether the restraining order was valid is not dispositive of the contempt issue. Even an invalid restraining order is sufficient basis on which to find contempt of Court. This order was issued to maintain the *status quo* pending determination of the rights of the parties. The authorities are practically unanimous that a restraining order, though legally infirm must be obeyed. If the Court has jurisdiction of the subject matter and the parties, as the Court did in this matter, the fact that the order

later turns out to be erroneous has no bearing on whether or not a contempt has been committed. *United States* v. *Shipp*, 203 U.S. 563, 573 (1906); *United States* v. *United Mine Workers*, 330 U.S. 258, 289-295 (1947); *Anderson* v. *Dean*, 354 F.Supp. 639, 644-45 (N.D. Ga. 1973); 17 Am.Jur.2d *Contempt* § 43; Annot., 12 A.L.R. 2d 1059, 1078, § 6 (1950). The philosophical basis of this rule is simple but sound; a Court ought to have time to determine legal issues presented to it, and has the right in the meantime to preserve the *status quo*.

The Journal suggests that the rule is otherwise where "pure" speech is involved. In *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), a case which upheld a finding that racial protesters had been in contempt of a court order forbidding their protest, the Supreme Court stated, "We emphatically reject the notion that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by 'pure' speech." 388 U.S. at 316 (quoting *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965)). In *Cox* v. *Louisiana*, 379 U.S. 559 (1965), *reh. denied*, 380 U.S. 926, which involved picketing near a courthouse, the court had also stated, "We are not concerned here with such a pure form of expression as a newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone but with expression mixed with particular conduct." 379 U.S. at 564. From this language, the Journal draws considerable solace. It supposes that it is involved in "pure" speech and therefore that it should fare differently than those who not only speak out but who also march. It concludes that its involvement in "pure" speech absolves it of any responsibility to obey a restraining order. It cites no authority for this proposition, nor does it suggest any principle which affords to the press less responsibility for obeying a restraining order than other citizens. The type of speech certainly does not set the

Journal apart from the citizenry who can be punished for violation of a restraining order prohibiting marches to protest racial discrimination, *Walker* v. *City of Birmingham*, *supra*, or the rights of laborers to strike against the Government or others operating coal mines, *United States* v. *United Mine Workers*, *supra*; *Howat* v. *Kansas*, 258 U.S. 181 (1922).

In *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), the district court had ordered that news reporters not report the testimony taken in a case because it might affect trial of the underlying criminal case in a state court. Two reporters ignored the ban on publication, were held in contempt and fined $300 each. The Court of Appeals held that the ban on a free press was "constitutionally unacceptable, and hence illegal." 465 F.2d at 509. The court further held that, in spite of the unconstitutional and illegal character of the injunction, a restraining order must be obeyed until set aside subject to three conditions: (1) the court must have subject matter and personal jurisdiction over the action; (2) adequate and effective remedies must be available for orderly review of the challenged ruling, and (3) the order must not require an irretrievable surrender of constitutional guarantees. 465 F.2d at 511. The Court of Appeals remanded the action to the district court to determine whether the judgment of contempt or the punishment was appropriate in light of the constitutional infirmity of the order. The order in *Dickinson*, *supra*, was blatantly invalid. There was nothing good that could be said in its favor. In the circumstances under consideration, serious, important and close issues are involved, which have not previously been squarely faced. This action fits neatly into the three conditions set forth in *United States* v. *Dickinson*, *supra*, and has with it a serious and doubtful issue of constitutional dimension.

In its bench decision on preliminary injunction, the Court relied on two Supreme Court opinions, *Cox Broadcasting Company* v. *Cohen*, 420 U.S. 469 (1975) and *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), which involved efforts to prevent dissemination of news, both based upon state statutes. After additional consideration, the Court finds the issue here quite different in at least two ways: (1) a court has already finally ruled that the Journal was not entitled to have the information, and (2) this controversy appears to pit one constitutional principle against another in a battle not previously fought, each having sound reason for a claim of superiority in the circumstances. This action is also quite different from the issues considered in cases involving clashes between the First Amendment right to a free press and the Sixth Amendment right to a fair trial. A Court can by a variety of actions insulate a jury and leave the press free to peddle its information. This is not true with respect to privacy interests which require that the information be denied the public in order to be effective as a right. Thus, it is understandable that in *Wood* v. *Goodson*, 485 S.W.2d 213 (Ark. 1972), the court held that an order which prevented a newspaper from publishing a jury verdict in a criminal case was wholly void and that violation of such an order cannot constitute contempt.

It is true that the preservation of a free press is an essential bulwark to a democratic society. Freedom of the press stands high in the list of fundamental and vital rights. When weighted with the right of the public to be free from unreasonable intrusion, the scales would appear to be at least evenly balanced, and hence require that each have at least equal weight.

IV. Summation: The Court's Right To Determine Controversies

The judicial power of the United States is vested in the courts by Article III of the Constitution. The courts have the right to determine controversies between litigants. *Muskrat* v. *United States*, 219 U.S. 346, 361 (1911); *General Investment*

Co. v. *New York Central R. Co.*, 271 U.S. 228, 230 (1926). The court has, as an ancillary power, the authority to punish for contempt. *Michaelson* v. *United States*, 266 U.S. 42, 65-66 (1924).

In this instance the Journal seized the judicial power to itself. This is a serious controversy involving prior court determinations and conflicts between constitutional principles. Although the order might ultimately be held to be invalid, there is enough substance to it to expect law-abiding persons to respect it at least briefly. The Journal showed no respect whatsoever, and, therefore, it must be found in contempt of the order entered November 13, 1985.

In *Walker* v. *City of Birmingham*, 388 U.S. 307, 320-21 (1967), the court stated:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.... [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

The First Amendment is not the only law to be obeyed. All other provisions of the Constitution must be served, including the Fourth Amendment right of the people to be secure in their homes, papers and effects, and the constitutional right and duty of the court to determine the law under Article III.

The Court will hear the parties at 10:00 A.M., on the 27th day of March, 1986, for the purpose of imposing a penalty upon the Journal and its Executive Editor.

The Special Prosecutor will present a form of Judgment in conformity with this Opinion.

So Ordered.

(s) Francis J. Boyle
Francis J. Boyle, Chief Judge.

March 18, 1986.

In the United States District Court
For the District of Rhode Island

Civil Action No. 85-0707B
Misc. No. 86-003B

RAYMOND J. PATRIARCA,
PLAINTIFF,

v.

FEDERAL BUREAU OF INVESTIGATION,
AND
WILLIAM H. WEBSTER, DIRECTOR,
AND
UNITED STATES DEPARTMENT OF JUSTICE,
AND
EDWIN MEESE, ATTORNEY GENERAL,
AND
THE PROVIDENCE JOURNAL COMPANY.

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER IN CRIMINAL CONTEMPT

ORDER

The Providence Journal Company and its Executive Editor, Charles M. Hauser have been found guilty of criminal contempt. The parties have been heard with respect to an appropriate penalty.

The offense is serious. The Providence Journal Company has chosen to defy an appropriate Court Order and boldly communicate that defiance to hundreds of thousands of residents of this area. The penalty must be substantial.

There are circumstances which suggest mitigation. Most significant is the damage which the Providence Journal Company has managed to inflict upon itself. It has succeeded in tarnishing its image as a law-abiding institution, perhaps irretrievably. It has managed by its own efforts to seriously impeach its future credibility. This is indeed an unfortunate occurrence because so much depends upon the communication of information and views which are both believable and trustworthy.

Of lesser significance, but entitled to be weighed in the balance, is the fact that although a series of articles concerning the so-called "Patriarca Tapes" have been promised, only one article has been brought to this Court's attention. It appears that upon reflection, a decision was deliberately made not to make a bad situation worse.

The circumstances are quite unlikely to be repeated in the future. The Court is satisfied that the zealous First Amendment bias of the Journal Company is real though in this instance seriously misguided. True freedom requires that each person respect the rights of all others. A violation of any person's freedom diminishes the freedom of all.

In substance, the offense is a mistake in judgment conditioned by a mistaken but sincerely held belief in the righteousness of its action. Defendants actions were wrong and the wrong must be righted as best it can. There is no totally satisfactory remedy. There is no practical way to turn back the clock and to restore things as they once were.

The purposes to be served are stated in *United States* v. *Mine Workers*, 330 U.S. 258, 302-303 (1947):

> Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 441. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.

The wrong was repeated more than 200,000 times. The Journal's publication sells at retail for .35¢ per copy. Additionally it receives advertising revenues. A penalty of .50¢ per copy is reasonable, and therefore a fine in the amount of $100,000 to be satisfied within 60 days is imposed against the Providence Journal Company.

Mr. Hauser, according to the evidence, was a principal actor. Others were involved but are not now before the Court. Although a jail term is permitted in the circumstances, because of the involvement of others, Mr. Hauser might be perceived as a victim. Furthermore, a jail term would not serve a truly constructive purpose, would result in public expense and would not be beneficial to the public as other alternatives. Mr. Hauser's sentence is suspended and he is placed on probation for a term of 18 months on the usual conditions and is further ordered to perform 200 hours of public service in a program approved by the Probation Office to be carried out within a period of 18 months from the entry of this order. The program will be designed by the Probation Office with a view to employ Mr. Hauser's talents as constructively as possible. The Court specifically suggests that Mr. Hauser's talents might be used in the efforts of the Rhode Island Heritage Commission to publish the Rhode Island Ethnic Pamphlet Series, designed to present and describe the various

unique contributions, customs and folkways of ethnic groups to the State of Rhode Island.

So ORDERED.

(s) FRANCIS J. BOYLE
FRANCIS J. BOYLE, Chief Judge
United States District Court
District of Rhode Island

April 2, 1986.

United States Court of Appeals
For the First Circuit

No. 86-1336

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT.

PROVIDENCE JOURNAL COMPANY
AND CHARLES HAUSER,

APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. FRANCIS J. BOYLE, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
WISDOM,* *Senior Circuit Judge*,
and COFFIN, *Circuit Judge*.

Floyd Abrams with whom *Cahill, Gordon & Reindel, Edward F. Hindle, William P. Robinson, III, Jeffrey C. Schreck, Edwards & Angell, Joseph V. Cavanagh, Jr.* and *Blish & Cavanagh* were on brief for appellants.

Ralph G. Elliot, Tyler, Cooper & Alcorn on brief for Hartford Courant and The Concord Monitor, amici curiae.

James C. Goodale, John G. Koeltl, Arthur H. Amron and *Debevoise & Plimpton* on brief for CBS Inc., The New York Times Company and The Washington Post, amici curiae.

William A. Curran with whom *Robert D. Parrillo* and *Hanson, Curran & Parks* were on brief for appellee.

Wendy M. Keats and *John F. Cordes*, Appellate Staff, Civil Division, Department of Justice, *Richard K. Willard*, Assistant Attorney General, and *Lincoln C. Almond*, United States Attorney, on brief for United States, amicus curiae.

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* Of the Fifth Circuit, sitting by designation.

December 31, 1986

WISDOM, Circuit Judge. This appeal presents an apparent conflict between two fundamental legal principles: the hallowed First Amendment principle that the press shall not be subjected to prior restraints; the other, the sine qua non of orderly government, that, until modified or vacated, a court order must be obeyed. The district court adjudged the defendants/appellants, the Providence Journal Company and its executive editor, Charles M. Hauser, (collectively referred to as the "Journal") guilty of criminal contempt. The Journal admits that it violated the order but argues that the order was a prior restraint and that the unconstitutionality of the order is a defense in the contempt proceeding. We agree. A party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it.

FACTS

From 1962 to 1965, the Federal Bureau of Investigation conducted electronic surveillance of Raymond L. S. Patriarca, reputedly a prominent figure in organized crime. The FBI conducted this surveillance without a warrant in violation of his Fourth Amendment rights. The FBI later destroyed all tape recordings relating to this surveillance but retained the logs and memoranda compiled from the recordings. In 1976, the Journal requested the logs and memoranda from the FBI under the Freedom of Information Act ("FOIA").[1] The FBI refused this request on the ground that disclosure would be an unwarranted invasion of personal privacy.[2] The Journal then brought suit in the Federal District Court for the District of Rhode Island to compel disclosure.[3] On appeal, we ruled that the FBI was within its discretion when it refused the Journal's request.[4]

[1] 5 U.S.C. §552.

[2] 5 U.S.C. §552(b)(7)(c).

[3] Providence Journal Co. v. F.B.I., 460 F.Supp. 762 (D.R.I. 1978).

[4] Providence Journal Co. v. F.B.I., 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 752 (1980).

In the spring of 1985, after the death of Raymond L. S. Patriarca, the Journal renewed its FOIA request to the FBI for the logs and memoranda. The FBI assented to this request and furnished the materials not only to the Journal, but also to WJAR Television Ten and other news media. On November 8, 1985, Raymond J. Patriarca ("Patriarca"), Raymond L. S. Patriarca's son, filed a summons and complaint against the FBI,[5] WJAR, and the Journal.[6] The action was based on the FOIA,[7] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"),[8] and the Fourth Amendment. The complaint alleged that the FBI had wrongfully released the logs and memoranda to the Journal and WJAR. At the same time Patriarca filed the complaint, he filed a Motion for Temporary Injunctive or Injunctive Relief seeking an order "enjoining the named defendants from disseminating or publishing [the] logs and [memoranda]...."

On November 12, 1985, the summons, complaint, and motion were served on the Journal. One day later, the district court held a conference concerning the request for a temporary restraining order. Counsel for the Journal argued that any restraining order would constitute a prior restraint forbidden by the First Amendment. Over the objections of counsel for the Journal and the government, the court entered a temporary restraining order barring publication of the logs and memoranda by the Journal and WJAR. The district court set a hearing for November 15, 1985, at which time it would decide whether to vacate the order. The district court later vacated the order and denied preliminary injunctive relief against the Journal and WJAR.

[5] Patriarca also named other federal agencies as defendants. Those parties are not relevant for purposes of this appeal.

[6] Several of the illegally intercepted conversations were between Raymond J. Patriarca and Raymond L. S. Patriarca.

[7] 5 U.S.C. §552.

[8] 18 U.S.C. §§ 2510-2520.

On November 14, 1985, the day after the district court issued the order, and while that order was still in effect, the Journal published an article on the deceased Patriarca that included information taken from the logs and memoranda. The son filed a motion to judge the Journal in contempt. When he declined to prosecute the criminal contempt motion, the district court invoked Fed. R. Crim. P. 42(b) and appointed a special prosecutor. Following a hearing, the district court found the Journal guilty of criminal contempt. Subsequent to a sentencing hearing, the court imposed an 18-month jail term on Hauser, which was suspended, ordered Hauser to perform 200 hours of public service, and fined the Journal $100,000. The Journal appealed.

Discussion

This appeal propounds a question that admits of no easy answer. Each party stands on what each regards as an unassailable legal principle. The special prosecutor relies on the bedrock principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or vacated.[9] This principle is often referred to as the "collateral bar" rule. The Journal relies on the bedrock principle that prior restraints against speech are prohibited by the First Amendment.[10] In this opinion we endeavor to avoid deciding which principle should take precedence by reaching a result consistent with both principles.

Of all the constitutional imperatives protecting a free press under the First Amendment, the most significant is the restriction against prior restraint upon publication. "[T]he chief pur-

[9] *See* Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

[10] Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

pose of [the First Amendment's free press] guaranty [is] to prevent previous restraints upon publication."[11] Indeed, "prior restraints upon speech and publication are the most serious and least tolerable infringement on First Amendment rights".[12] Prohibiting the publication of a news story or an editorial is the essence of censorship. The power to censor is the power to regulate the marketplace of ideas, to impoverish both the quantity and quality of debate, and to restrict the free flow of criticism against the government at all levels. It is plain now as it was to the framers of the Constitution and Bill of Rights that the power of censorship is, in the absence of the strictest constraints, too great to be wielded by any individual or group of individuals.

If a publisher is to print a libelous, defamatory, or injurious story, an appropriate remedy, though not always totally effective, lies not in an injunction against that publication but in a damages or criminal action *after* publication.[13] Although the threat of damages or criminal action may chill speech, a prior restraint "freezes" speech before the audience has the opportunity to hear the message.[14] Additionally, a court asked to issue a prior restraint must judge the challenged speech in the abstract.[15] And, as was true in the instant case, a court may issue a prior restraint in the form of a temporary restraining order or preliminary injunction without a full hearing; a judgment for damages or a criminal sanction may be imposed only after a full hearing with all the attendant procedural protections.[16]

[11] *Near*, 283 U.S. at 713.

[12] *Nebraska Press Assoc.*, 427 U.S. at 559.

[13] *Near*, 283 U.S. at 720.

[14] *Nebraska Press Assoc.*, 427 U.S. at 559 ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.")

[15] In re Halkin, 598 F.2d 176, 185 n.17 (D.C. Cir. 1979).

[16] *Id.* at 184 n.15, citing Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 657-58 (1955).

Equally well-established is the requirement of any civilized government that a party subject to a court order must abide by its terms or face criminal contempt.[17] Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified. As a general rule, a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding. Rather, the appropriate method to challenge a court order is to petition to have the order vacated or amended.

In *Walker* v. *City of Birmingham*,[18] the Supreme Court upheld contempt citations against Dr. Martin Luther King, Jr. and other civil rights protestors enjoined from parading without a permit. The protestors argued that the order and the ordinance upon which it was based were unconstitutional because they constituted impermissible prior restraints upon the right to free speech and assembly. The Court noted that the ordinance "unquestionably raise[d] substantial constitutional issues"[19] and that "[t]he breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question".[20] Nonetheless, the court ruled that the protestors could not raise those constitutional issues collaterally in the contempt proceedings. As the Supreme Court noted in *United States* v. *United Mine Workers*,[21] so long as the court has jurisdiction over the parties and the subject matter of the controversy, an order it issues must be obeyed.[22]

The *Walker* Court found it significant that the contemnors had not sought to appeal the order they violated. The Court declared: "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims."[23] The *Walker* Court concluded by noting that "no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion".[24]

[17] *Walker*, 388 U.S. 307; *United Mine Workers*, 330 U.S. 258.

[18] 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967).

[19] 388 U.S. at 316.

[20] *Id.* at 317.

[21] 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

[22] *Id.* at 293 ("[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.")

At first glance, *Walker* would appear to control the instant case. There, as here, a party chose to violate an arguably unconstitutional prior restraint rather than to comply with the orderly process of law by seeking relief from an appellate court. *Walker* declares that the contemnors are collaterally barred from challenging the constitutionality of the order forming the basis of the contempt citation. The *Walker* Court was, however, careful to point out that the order issued by the Alabama court was not "transparently invalid". The Court specifically noted that "this is not a case where the injunction was *transparently invalid* or had only a frivolous pretense to validity".[25] The unmistakable import of this language is that a transparently invalid order cannot form the basis for a contempt citation.[26]

Court orders are accorded a special status in American jurisprudence. While one may violate a statute and raise as a defense the statute's unconstitutionality, such is not generally

[23] 388 U.S. at 318.

[24] *Id.* at 320-21.

[25] *Id.* at 315 (emphasis added).

[26] *See* 3 Wright, Federal Practice & Procedure §702 at 815 n.17 (1982) (collateral bar rule does not apply if the order violated was transparently unconstitutional); State ex rel. Superior Court of Snohomish County v. Sperry, 79 Wash.2d 69, 483 P.2d 608 (1971), *cert. denied*, 404 U.S. 939, 92 S.Ct. 272, 30 L.Ed.2d 252 (contempt citation improper because order violated was transparently void); *see also* United States v. Dickinson, 465 F.2d 496, 509-10 (5th Cir. 1972) (recognizing exception to collateral bar rule for transparently invalid orders); Ex parte Purvis, 382 So.2d 512, 514 (Ala. 1980) (same).

the case with a court order.[27] Nonetheless, court orders are not sacrosanct.[28] An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule.[29] Were this not the case, a court could wield power over parties or matters obviously not within its authority—a concept inconsistent with the notion that the judiciary may exercise only those powers entrusted to it by law.

The same principle supports an exception to the collateral bar rule for transparently invalid court orders. Requiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress. Recognizing an exception to the collateral bar rule for transparently invalid orders does not violate the principle that "no man can be judge in his own case"[30] anymore than does recognizing such an exception for jurisdictional defects. The key to both exceptions is the notion that although a court order—even an arguably incorrect court order—demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority.

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[27] *Compare* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1968) with *Walker*, 388 U.S. 307; *see also Dickinson*, 465 F.2d at 510.

[28] *See* Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *accord* United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971). In *Cobbledick*, the Supreme Court ruled that when a motion to quash a subpoena is denied, the movant may either obey its commands or violate them, and, if cited for contempt, properly contest its validity in the contempt proceeding. *Cf.* Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975).

Although these cases are arguably distinguishable from the instant case because they involve orders that require the surrender of irretrievable rights, they nonetheless establish that blind obedience to all court orders is not required. *See also Nebraska Press Assoc.*, 427 U.S. at 559 ("A prior restraint . . . has an immediate and irreversible sanction.")

[29] *United Mine Workers*, 330 U.S. at 293.

[30] *Walker*, 388 U.S. at 320-21.

Although an exception to the collateral bar rule is appropriate for transparently void orders, it is inappropriate for arguably proper orders. This distinction is necessary both to protect the authority of the courts when they address close questions and to create a strong incentive for parties to follow the orderly process of law. No such protection or incentive is needed when the order is transparently invalid because in that instance the court is acting so far in excess of its authority that it has no right to expect compliance and no interest is protected by requiring compliance.

The line between a transparently invalid order and one that is merely invalid is, of course, not always distinct. As a general rule, if the court reviewing the order finds the order to have had any pretence to validity at the time it was issued, the reviewing court should enforce the collateral bar rule. Such a heavy presumption in favor of validity is necessary to protect the rightful power of the courts. Nonetheless, there are instances where an order will be so patently unconstitutional that it will be excepted from the collateral bar rule.[31] We now turn to consider whether the order issued by the district court on November 13, 1985, was, as the Journal contends, transparently invalid.

As noted, the principal purpose of the First Amendment's guaranty is to prevent prior restraints.[32] The Supreme Court has declared: "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."[33] When, as here, the prior restraint impinges upon

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[31] We pause to note that the existence of a transparently unconstitutional order does not indicate an improper motive or incompetence. To the contrary, any number of factors including a short deadline, an excessive workload on the court, or the poor presentation of the issues by the parties can lead the court to issue an order that would not have been issued in the absence of the exigent circumstances.

[32] *Near*, 283 U.S. at 713.

[33] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

the right of the press to communicate news and involves expression in the form of pure speech—speech not connected with any conduct—the presumption of unconstitutionality is virtually insurmountable.[34]

The distinction between pure speech and speech involving conduct clearly distinguishes the order at issue in *Walker* from the order in the instant case.[35] Immediately after the *Walker* Court stated that the order of the Alabama court was not transparently invalid, it noted:

> We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated in *Cox* v. *Louisiana*, "We emphatically reject the notion...that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech."[36]

The clear import of this language is that a different result, or at a minimum a different analysis, would have been required had the *Walker* order restrained pure speech.[37]

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[34] *Nebraska Press Assoc.*, 427 U.S. at 558, 570 (White, J., concurring).

[35] The four dissenters in *Walker* found the ordinance invalid on its face and that the restatement of its provisions by the court in an order was not enough to justify the prior restraint. 388 U.S. 328, 345-46.

[36] *Walker*, 388 U.S. at 315-16 (citations omitted).

[37] *See, e.g.*, Cooper v. Rockford Newspapers, Inc., 50 Ill. App. 3d 250, 8 Ill. Dec. 508, 365 N.E.2d 746, 751 (1977) (distinguishing *Walker* on these grounds).

In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech. In *New York Times Co.* v. *United States*,[38] the Pentagon Papers case, the Court held that the New York Times and other newspapers could not be restrained even during wartime from publishing documents that had been classified top secret and obtained without authorization. Notwithstanding that the source who had provided the documents had obtained them possibly as a result of criminal conduct and notwithstanding the government's contention that publication would gravely and irreparably jeopardize national security, the Court refused to uphold the restraint. In his concurring opinion, Justice Stewart stated that a prior restraint upon publication was improper absent proof that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people".[39]

In its most recent decision on previous restraints on pure speech, *Nebraska Press Association* v. *Stuart*,[40] the Court struck down a gag order issued to ensure the protection of a criminal defendant's Sixth Amendment right to a fair trial. Intending to keep "the barriers to prior restraint...high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it",[41] the Court established a test so difficult to meet that Justice White was led to express his "grave doubt" that any prior restraint in the area would "ever be justifiable".[42] The

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[38] 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

[39] *Id.* at 730 (Stewart, J., concurring); *see also id.* at 726-27 (Brennan, J., concurring) ("Thus, only governmental allegations and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.")

[40] 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

[41] *Id.* at 561.

[42] *Id.* at 570 (White, J., concurring); *see also* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 497, 497-98 (1977) ("[T]he practical impact of the rule announced [in *Nebraska Press Association* v. *Stuart*] is to outlaw all prior restraints in fair trial/free press cases.").

test requires proof to be established "with the degree of certainty our cases on prior restraint require",[43] that (1) the nature and extent of pretrial publicity would impair the defendant's right to a fair trial; (2) there were no alternative measures which could mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm.[44] It is patently clear that the order of November 13, 1985, fails to pass muster under the *Nebraska Press Association* test.

Patriarca's request for injunctive relief was based on three grounds: the FOIA, Title III, and the Fourth Amendment. A brief review reveals that none of these three could conceivably support the restraint against publication.

In 1979, this Court upheld the FBI's refusal to comply with an FOIA request by the Journal for the Patriarca logs and memoranda.[45] We did not rule that the FBI was forbidden from disclosing those materials; rather, we held that the FBI *could*, in its discretion, turn down the request.[46] Indeed, in *Chrysler Corp.* v. *Brown*,[47] the Supreme Court made clear that the FOIA does not authorize an injunction against disclosure.[48] If the FOIA does not allow a court to prevent a federal agency from disclosing information to the public, it is beyond dispute that it cannot serve as the basis for an order prohibiting a newspaper that has received such information from publishing it. Even if the materials had been given to the Journal improperly or unlawfully, a prior restraint against publication would still be improper.[49]

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[43] 427 U.S. at 569.

[44] *Id.* at 562-68.

[45] *Providence Journal Co.*, 602 F.2d 1010.

[46] *Id.* at 1014-15 ("Our holding is not broad. It gives agencies no sweeping power to withhold information, and does not create a new, general exemption for illegally obtained information.... We decide only that the FBI may properly turn down this FOIA request under Exemption 7(C)") (footnote omitted).

[47] 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

[48] *Id.* at 293.

[49] *See New York Times Co.*, 403 U.S. 713.

Similarly, Title III provides no basis for a prior restraint. Title III provides an action for damages to individuals injured as a result of illegal interception or disclosure of private communications.[50] Title III does not, however, provide for injunctive relief, although Congress could have included such a provision.[51] Moreover, the Patriarca electronic surveillance was conducted between 1962 and 1965; Title III was not enacted until 1968. Although we need not decide the issue, we note that the District of Columbia Circuit Court of Appeals has ruled that Title III does not apply retroactively to illegal surveillance conducted before its enactment.[52] Thus, even if injunctive relief were available under Title III, such relief would not necessarily be available in this case.

The final basis for injunctive relief asserted by Patriarca was the Fourth Amendment. A review of the district court's opinion finding the Journal in contempt reveals that the Fourth Amendment issue was utmost on its mind when it entered the November 13, 1985 order. As private parties, however, the Journal and its executive editor cannot violate the Fourth Amendment. The Fourth Amendment protects citizens from abuses by the government,[53] not from actions of private parties.[54] Absent a claim that a newspaper and the FBI were somehow conspiring to violate an individual's rights, the Fourth Amendment simply cannot be the predicate of a prior

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[50] 18 U.S.C. §2520.

[51] Even if Congress had authorized the issuance of a prior restraint under either the FOIA or Title III, a court could issue such an order only if the restraint met the standards articulated by the Supreme Court. Obviously, Congress cannot abrogate by statute the protection accorded the press under the First Amendment.

[52] Zerilli v. Evening News Assoc., 628 F.2d 217, 220-21 (D.C. Cir. 1980).

[53] United States v. Calandra, 414 U.S. 338, 254, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects.") (emphasis added); Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

[54] *Burdeau*, 256 U.S. at 475; *Zerilli*, 628 F.2d at 223-24.

restraint. The Journal obtained the logs and memoranda as a result of a proper FOIA request. Although a Fourth Amendment violation might have occurred when the FBI conducted the surveillance, or possibly when it turned the information over to the media, no Fourth Amendment issues are implicated by the publication of that information by the Journal.[55]

The only interest implicated by the Journal's publication is Patriarca's right to privacy. That publication would prove embarrassing or infringe Patriarca's privacy rights is, however, an insufficient basis for issuing a prior restraint.[56] Rather, Patriarca's sole remedy was a subsequent action for damages,[57] an alternative that he did not pursue.

Although the Supreme Court has never upheld a prior restraint on publication of news,[58] the Court has implied that such a restraint might be appropriate in a very narrow range of cases, when either national security or an individual's right to a fair trial is at stake. An individual's right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude. But,

[55] Even if the Journal were subject to the Fourth Amendment, it is doubtful that Patriarca's Fourth Amendment rights could justify a prior restraint. In Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the Supreme Court declared that a prior restraint is unlawful unless it "fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraints". The special prosecutor has not cited and we have not found any case upholding a prior restraint issued to protect Fourth Amendment rights. *Cf. Nebraska Press Assoc.*, 427 U.S. 539 (possible exception to prohibition against prior restraints for orders protecting a defendant's right to a fair trial); *New York Times Co.*, 403 U.S. 713 (same for orders protecting national security).

[56] *Organization for a Better Austin*, 402 U.S. at 419; Bergelsman, *Injunctions Against Speech and Writing: A Re-Evaluation*, 59 Ky. L.J. 319, 349-50 (1970); *cf.* Konigsberg v. Time, Inc., 288 F.Supp. 989, 989 (S.D.N.Y. 1968).

[57] *See Near*, 283 U.S. at 720.

[58] *Cf. New York Times Co.*, 403 U.S. at 726 n* (Brennan, J., concurring) (Noting that orders prohibiting publication of materials that are obscene or violate copyright provisions are not prior restraints on the freedoms of speech and press protected under the First Amendment).

even assuming that Patriarca's right to privacy, or any other right he could assert, had measured up to the standard necessary for a court to deprive the press of its right to publish, and assuming that Patriarca had sufficiently proved that publication would "surely result in direct, immediate, and irreparable damage"[59] to his rights, the November 13, 1985, order suffered from other infirmities.

As the Supreme Court made clear in *Nebraska Press Association*, a party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available.[60] The district court failed to make a finding as to either of these issues, an omission making the invalidity of the order even more transparent. Indeed, had the court considered the likely efficacy of the order it would have concluded that the order would not necessarily protect Patriarca's rights. Other media, included non-parties to the Patriarca litigation, had the same information that the government had disclosed to the Journal. Moreover, Patriarca's complaint specifically alleged that portions of the information disclosed by the FBI had already been "disseminated" by the media. It is therefore hard to imagine a finding that the prior restraint would accomplish its purpose.

An additional point to note is that the prior restraint was issued prior to a full and fair hearing with all the attendant procedural protections. A prior restraint issued in these circumstances faces an even heavier presumption of invalidity,[61] and the transparent unconstitutionality of the order is made even more patent by the absence of such a hearing.[62]

[59] *Id.* at 730 (Stewart, J., concurring).

[60] 427 U.S. at 562-68.

[61] *See generally* Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984).

[62] We realize that holding a full hearing on short notice could greatly burden a district court. But, absent circumstances not present in this case, the First Amendment demands nothing less. If the parties agree, the district

The special prosecutor argues, however, that the order was to last only a short period and merely preserve the status quo while allowing the court a full opportunity to assess the issues. We are sympathetic with the district court on this score. This matter came before the district court on an emergency basis. The court was forced to drop its other duties and immediately address this issue. Counsel for the Journal had received the papers less than 24 hours before they presented their arguments to the district court. Based on counsel's hastily prepared authority and without the opportunity for cool reflection, the district court was forced to make a decision. The court's natural instincts was to delay the matter temporarily so that a careful, thoughtful answer could be crafted. This approach is proper in most instances, and indeed to follow any other course of action would often be irresponsible. But, absent the most compelling circumstances, when that approach results in a prior restraint on pure speech by the press it is not allowed.

It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history.[63] This is especially true in the case

court can hold the hearing on a less expedited basis. Whether the newspaper could renege on this agreement and demand an immediate hearing is a question we need not address.

The special prosecutor argues that the Journal did agree to abide by the order to allow the district court time to consider the matter when it asked the court to continue for one day the hearing set to determine whether the temporary restraining order should be vacated. No doubt the district court could reasonably assume, based on the request for a day's delay, that a responsible newspaper, represented by respected counsel, would not take advantage of the delay by publishing the Patriarca story before the hearing. It is clear from the record, however, that the Journal did not agree to obey the district court's order.

[63] *Dickinson*, 465 F.2d at 512.

of news concerning an imminent event such as an election. A restraining order lasting only hours can effectively prevent publication of news that will have an impact on that event and on those that the event affects.

Although there is no question that the Patriarca story was not news concerning an imminent event, extraneous factors required its reasonably prompt publication.[64] The Journal had promised its readers that the Patriarca story would be forthcoming. Moreover, other media not subject to the court order had the same logs and memoranda. Were they to disseminate this information while the Journal remained silent, some readers of the Journal might lose confidence in that paper's editorial competence.[65]

As the Supreme Court recognized in *Elrod* v. *Burns*,[66] "[t]he loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury".[67] The heavy presumption of unconstitutionality against a prior restraint "is not reduced by the temporary nature of [the] restraint".[68] In the Pentagon Papers case, Justice Brennan noted in his concurrence that "every restraint in this case,

[64] We need not decide whether our ruling would be different if it were absolutely clear that publication could be delayed without any untoward consequences to the publisher. We point out, however, that even in such a situation, a prior restraint would unquestionably impinge upon first Amendment rights and editorial discretion.

[65] In *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit applied the collateral bar rule in a contempt proceeding involving a gag order against a newspaper. We decline to follow Dickinson for two reasons. First, *Dickinson* involved an order issued to protect a defendant's Sixth Amendment right to a fair trial, while the order in the instant matter was issued merely to protect an individual's interest in privacy. Second, *Dickinson* was decided before *Nebraska Press Association*. Were the question presented to the Fifth Circuit now, in the light of the strict test established in *Nebraska Press Association*, a different result might be reached.

[66] 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

[67] *Id.* at 373.

[68] *Nebraska Press Assoc.*, 427 U.S. at 559.

whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly".[69]

Although the Journal arguably had avenues of appellate relief immediately available to it,[70] we decline to invoke the collateral bar rule because of the Journal's failure to avail itself of these opportunities.[71] When, as here, the court order is a transparently invalid prior restraint on pure speech, the delay and expense of an appeal is unnecessary. Indeed, the delay caused by an appellate review requirement could, in the case of a prior restraint involving news concerning an imminent event, cause the restrained information to lose its value. The absence of such a requirement will not, however, lead to widespread disregard of court orders. Rarely will a party be subject

[69] *New York Times Co.*, 403 U.S. at 727 (Brennan, J., concurring); see also Goldblum v. National Broadcasting Corp., 584 F.2d 904, 906-07 (9th Cir. 1978).

[70] Arguably, the Journal could have immediately appealed the order to this Court under 28 U.S.C. §1292(a)(1). *See* Societe Generale de Surveillance v. Raytheon European Management and Systems Co., 643 F.2d 863, 364 n.2 (1st Cir. 1981). And, although difficult to obtain, the Journal might have sought a writ of mandamus. 28 U.S.C. §1651(a).

[71] If the publisher must appeal, it "faces a dilemma: either violate the order, risking almost certain conviction for contempt, and lose the right to challenge the order's constitutionality, or alternatively, obey the order, seek review, and forfeit, at least temporarily, the very right the would-be speaker seeks to vindicate. The dilemma is particularly acute where First Amendment interests are at stake, for even a temporary restraint on expression may constitute irreparable injury. *Nebraska Press Ass'n*, 427 U.S. at 559, 96 S.Ct. 2791, *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 182, 89 S.Ct. 347 (1968)." *In re Halkin*, 598 F.2d at 184 n.15; *see also Goldblum*, 584 F.2d at 907. ("A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt."); Goodale, 29 Stan. L. Rev. at 509 (*Walker* does not require a party subject to a transparently invalid prior restraint to seek appellate review.).

to a transparently invalid court order. Prior restraints on pure speech represent an unusual class of orders because they are presumptively unconstitutional.[72] And even when a party believes it is subject to a transparently invalid order, seeking review in an appellate court is a far safer means of testing the order. For if the party chooses to violate the order and the order turns out not to be transparently invalid, the party must suffer the consequences of a contempt citation.

Conclusion

We conclude that the district court's order of November 13, 1985, was transparently invalid. The order constitutes a presumptively unconstitutional prior restraint on pure speech by the press. The burden necessary to sustain such an order is tremendously heavy[73] and was not met in this case. The only potential danger posed by the restrained speech was to an individual's privacy right. That right can be adequately protected by a subsequent damages action. Moreover, the district court failed to find with certainty that the restraint would accomplish its goal and that no less restrictive alternatives were available. Indeed, it is clear that the court could not have found that the order would necessarily be effective.

Because the order was transparently invalid, the appellants should have been allowed to challenge its constitutionality at the contempt proceedings.[74] A fortiori, the order cannot serve

[72] *Nebraska Press Assoc.*, 427 U.S. at 558.

[73] *Southeastern Promotions Ltd.*, 420 U.S. at 558; *New York Times Co.*, 403 U.S. at 714; *Organization for a Better Austin*, 402 U.S. at 419.

[74] *See State ex rel. Superior Court of Snohomish County*, 79 Wash.2d 69, 483 P.2d 608; Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Wood v. Goodson, 253 Ark. 196, 485 S.W.2d 213 (1972); *Cooper*, 50 Ill. App. 3d 250, 8 Ill. Dec. 508, 365 N.E.2d 746 (1977); Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 553-58 (1977); Goodale, 29 Stan. L. Rev. at 509; *see also* Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

In *Thomas*, a labor organization was enjoined from soliciting union memberships. The organizer violated the order and subsequently challenged

as the basis for a contempt citation. The order of the district court finding the Providence Journal Company and its executive editor, Charles M. Hauser, in criminal contempt is therefore reversed.[75]

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its constitutionality arguing that the temporary restraining order constituted a prior restraint on pure speech. The Supreme Court allowed this challenge and reversed the contempt citation.

The Journal argues that *Thomas* stands for the proposition that the collateral bar rule does not apply to prior restraints on pure speech. Because the order of November 13, 1985, was transparently invalid, however, we need not address this issue. We note, however, that *Thomas* does provide support for our holding. *Thomas* held that any prior restraint on pure speech was invalid absent clear and present danger of immediate and irreparable injury to the public welfare. Moreover, *Thomas* establishes that the collateral bar rule is not impregnable in cases involving prior restraints on pure speech.

[75] In reversing the contempt citation against the Journal and its executive editor, we in no way condone their conduct. From all appearances, the Journal used the presence of the court order to bolster the importance of the Patriarca story. On November 14, 1985, the day before the scheduled hearing on whether to vacate the Court order of November 13, the Journal's front page headline read: "Court restricts media use of FBI tapes on Patriarca; Journal decides to print". Upon learning of this "battle with the courts", readers would be curious as to what information about Patriarca could be so important that a federal court would prohibit its publication. Not only would more people read the story, but hopefully, those who read the story would respect the Journal's courage in defying the court order and would have a greater appreciation for the Journal's investigative reporting techniques that resulted in the uncovering of the information in the story.

By publishing the Patriarca story the day before the scheduled hearing and by not seeking expedited appellate review of the court's order, the Journal invited a confrontation. We strongly encourage a party subject to a court order to follow the orderly process of law and appeal the order, even if it is transparently invalid, as we have written. But we do not believe that the Journal violated the law when it defied the order of November 13, 1985. Nor do we believe the Journal should have refrained from informing its readers that a court order prohibiting publication had been entered. But it appears to this court that the Journal published the story concerning the court order more for its publicity value than for its news value. Moreover, while professing respect for the judge who entered the order, the Journal chose to make its defiance of that order its headline story.

Misuse of the power of the press cannot be curbed constitutionally by prior restraints in the absence of the most compelling of circumstances, at least where national security is not involved. Although the Journal's actions are not in keeping with its long and distinguished history of responsible journalism they cannot form the basis for a contempt citation.

United States Court of Appeals
For the First Circuit

No. 86-1338

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE DIRECTOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT.

PROVIDENCE JOURNAL COMPANY
AND CHARLES HAUSER,
APPELLANTS.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER,
TORRUELLA AND SELYA, *Circuit Judges*.

REHEARING EN BANC
ORDER AND OPINION
ENTERED: MAY 12, 1987

ORDER

We hereby grant petitioner's suggestion for rehearing en banc. We do not, however, vacate the panel's opinion and order dated December 31, 1986. Rather, we issue the attached en banc opinion as an addendum to, and modification of, said panel opinion; and as so modified said panel opinion and order may stand as reflecting the opinion of the en banc court.

Judge Selya does not concur in the above order and attached en banc opinion. Rather he believes the court should hold a hearing and decide the case anew after full briefing and argument.

OPINION

Per Curiam. In reflecting en banc upon the conflicting principles of "collateral bar" and "no prior restraint against pure speech," the court recognizes, with the panel, the difficulties of imposing upon a publisher the requirement of pursuing the normal appeal process. Not only would such entail time and expense, but the right sought to be vindicated could be forfeited or the value of the embargoed information considerably cheapened. Nevertheless, it seems to us that some finer tuning is available to minimize the disharmony between respect for court orders and respect for free speech.

It is not asking much, beyond some additional expense and time, to require a publisher, even when it thinks it is the subject of a transparently unconstitutional order of prior restraint, to make a good faith effort to seek emergency relief from the appellate court. If timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceedings.[1] In such event whatever added expense and time are involved, such a price does not seem disproportionate to the respect owing court processes; and there is no prolongation of any prior restraint. On the other hand, should the appellate court grant the requested relief, the conflict between principles has been resolved and the expense and time involved have vastly been offset by aborting any contempt proceedings.

We realize that our ruling means that a publisher seeking to challenge an order it deems transparently unconstitutional must concern itself with establishing a record of its good faith

[1] *See* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 497, 509-10 (1977) (arguing that *Walker* v. *City of Birmingham*, "may require no more than an attempt to appeal a void restraining order up to the time the constitutionally protected action is planned to take place.").

effort. But that is a price we should pay for the preference of court over party determination of invalidity. In the instant case, assertions have been made that some eight-and-one-half hours elapsed between the issuance of the order by the district court and the deadline for publication. Not only are we left without a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making, but we would deem it unfair to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced. We recognize that our announcement is technically dictum, but are confident that its stature as a deliberate position taken by us in this en banc consideration will serve its purpose.